Delict in Scotland in 2018

I. Scotland

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A. Legislation

1. Prescription (Scotland) Act 2018, asp 15

1 The negative prescription of obligations - that is, their extinction by virtue of the passage of time - is governed in Scots law by the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act'). Delictual obligations fall within the scope of the Act. Over time, a consensus has emerged that the Act suffers from a number of defects. To remedy these defects, the Prescription (Scotland) Act 2018 ('the 2018 Act') was passed by the Scottish Parliament.

2 The 1973 Act applies a short negative prescriptive period of five years to any obligation arising from liability (whether arising from an enactment or a rule of law) to make reparation.[1] A quinquennium thus applies to the duty to pay damages arising from delictual liability. However, there has been some doubt as to whether it applies to other sorts of delictual obligation, apart from the obligation to pay damages. The 2018 Act clears up this uncertainty by providing that the prescriptive period also applies to 'any obligation arising from delict, not being an obligation falling within any other provision' of the Act.[2] It also amends the law by changing the previous references to an obligation to make reparation arising from an enactment or rule to law to a more broadly stated 'obligation to pay damages (whatever the source of the obligation)'.[3] The more readily understood term 'damages' has been adopted in place of the traditional Scottish term 'reparation'.

3 A further terminological change has been effected, in that the words 'act, neglect or default' in sec 11 of the 1973 Act have been replaced with the words

1 See the 1973 Act, sec 6 and Schedule 1, para 1(d).
2 New paragraph 1(da) of Schedule 6, added by sec 1(2) of the 2018 Act.
3 Amended para 1(d) of Schedule 6, as altered by sec 1(2) of the 2018 Act. Section 11 of the 1973 Act is also amended, to the same effect.

'acts or omission'.[4] Section 11 is the principal section dealing with when the prescriptive period applying to obligations to pay damages is deemed to commence. The reason for this terminological change is twofold: it creates consistency with the language used in a later section of the Act (sec 17), and it focuses attention more closely on matters of fact (whether an act or omission has occurred) rather than on matters of liability (whether there has been 'neglect' or 'default') which are irrelevant to whether or not the occurrence of injury or damage could reasonably have been discovered (as required under the discoverability test set out in sec 11).

4 The substance of the discoverability test has itself also been altered by the 2018 Act: previously the law provided that the quinquennial prescriptive period applicable to damages could be postponed in cases where 'the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage … had occurred', the postponement being to the time when 'the creditor first became, or could with reasonable diligence have become, so aware'.[5] That provision is amended to add in further requirements beyond the creditor simply becoming aware of the fact of the loss, injury or damage: the new provision adds the further requirements of the creditor's awareness of (i) the fact that the loss, injury or damage was caused by a person's act or omission, and (ii) the identity of the person who caused the loss, injury or damage.[6] It also clarifies that it does not matter whether the creditor was aware that the act or omission that caused the loss, injury or damage was actionable at law.[7] These amendments address uncertainties surrounding the previous provisions that had troubled the courts for years.

5 A further amendment in relation to damages claims has been made by sec 8 of the 2018 Act. Under the original rules, the time when the absolute prescription of damages claims begins to run (the date on which damage occurred) might not occur until a considerable period of time after the harmful event occurred. The 1973 Act did not address this concern. Section 8 of the 2018 Act does so, by introducing a start date for a twenty-year period of long negative prescription applicable to damages claims: after the expiry of this twenty-year period, any damages claim will be absolutely extinguished, whether or not the damage has yet manifested itself. This period runs from either the time on which the act or omission occurred (or the last such date, where there was more than one act or omission), or else, where the act or omission was a continuing one, the date on which it occurred.[8] So, when this provision comes into force, there will be no possibility of, for instance, a negligently constructed building not manifesting damage until thirty years after its construction, and the owner being entitled to

4 2018 Act, sec 5(2),(3).
5 1973 Act, sec 11(3).
6 1973 Act, new sec 11 (3A), inserted by the 2018 Act, sec 5(5).
7 1973 Act, new sec 11 (3B), inserted by the 2018 Act, sec 5(5).
8 New sec 11(4) of the 1973 Act, inserted by the 2018 Act, sec 8.

sue the builder for damages at that stage; the obligation to pay damages will prescribe twenty years after the date of the builder's negligence.

6 These are the principal changes to the prescriptive rules applicable to delictual claims made by the 2018 Act. The Act resulted from recommendations made in a 2017 Report of the Scottish Law Commission,[9] and is a good example of the sort of technical statutory amendment which is done well by Law Commissions but which can, in the absence of such work, be overlooked by legislative bodies focused on matters considered by them to be of more pressing public need. Sections 15–18 of the 2018 Act (its ancillary provisions) came into force on 19 December 2018, with the remainder of the Act to come into force on a subsequent date to be appointed.

B. Cases

1. *Steel & another v NRAM Ltd*, Supreme Court, 28 February 2018, [2018] United Kingdom Supreme Court (UKSC) 13: Professional Negligence Claim against Solicitor for Negligent Misstatement

a) Brief Summary of the Facts

7 The facts of the case are as previously reported in the 2016 Yearbook: the pursuers (and respondents), NRAM Ltd, are commercial lenders. They granted loan facilities to Headway Caledonian Limited (HCL), a client of the first defender (and appellant), Ms Steel, who was a solicitor. The loan related to HCL's purchase of four commercial premises, in return for which HCL granted a security over the whole property. In response to a communication by NRAM indicating that they wished to discharge the security in relation to a portion of the whole property, Ms Steel replied by an email which she indicated had attached to it 'discharges for signing and return as well as the whole loan is being paid off for the estate and I have a settlement figure for that'. In reliance on this request, NRAM were misled by Ms Steel into discharging the entire security when it ought to have been left in place in relation to two of the units. NRAM argued that this error had been induced by Ms Steel's email, whose contents amounted to a negligent misstatement for which she, and the firm by whom she was employed (the second defenders), should be held responsible. HCL having gone into liquidation, NRAM claimed damages amounting to approximately £ 458,000 from the defenders.

[9] Scottish Law Commission, Report on Prescription (Scot Law Com No 247, 2017).

8 At first instance, the judge held that Ms Steel had owed no duty of care to NRAM when she made the erroneous statements because (1) it had not been reasonable for them to rely on Ms Steel's statements without checking their accuracy, and (2) Ms Steel could not reasonably have foreseen that they would rely on her statements without carrying out such a check. On appeal to the Inner House of the Court of Session, the appeal court (by a 2:1 majority) overturned the judgment at first instance, and held Ms Steel to have assumed a responsibility in delict to the pursuers in relation to the statements she had made. Ms Steel appealed this decision to the Supreme Court.

b) Judgment of the Court

9 The Supreme Court allowed the appeal, holding that: (1) a representee is required to establish that it was reasonable to have relied on a representation and that the representor should reasonably have foreseen such reliance; (2) in an arm's length transaction, such as the one in this case, a solicitor owes a duty to his/her client but will generally not owe a duty to the other party to the transaction; (3) the Supreme Court would only set aside the evaluation of the judge at first instance that it was reasonable for the solicitor not to have foreseen that the other party would rely on her representations without first checking their accuracy if it was satisfied that that evaluation was wrong; and (4) the evaluation at first instance had been a correct one, and therefore the appeal would be allowed and the claim of NRAM against Ms Steel dismissed.

c) Commentary

10 In the discussion of this case in the 2016 Yearbook, it was noted that a detailed dissenting judgment had been given by one of the judges in the Inner House of the Court of Session stating why he believed there to be no grounds for disturbing the decision at first instance that it was not reasonable for the pursuer to rely on the representation. That dissenting judgment has been vindicated by this appeal to the Supreme Court.

11 The decision of the Supreme Court is worthy of note for two reasons. First, it reaffirms the well-established rule that solicitors in general only assume a duty to advise their own clients, and not the other side in any transaction. There are exceptions to that general rule, and the Supreme Court mentions examples of cases where an exception has applied: for instance, the New Zealand case of *Allied Finance and Investments Ltd v Haddow and Co*,[10] in which a solicitor had issued a certificate to the other party falsely certifying the truth of a specific matter. In the Supreme Court's view, the case before it was not such a case, and the majority of the Inner House had erred in thinking that it was. While Lady Smith in the Inner House had sought to answer the liability question simply by asking whether the solicitor had assumed a responsibility to her client (holding that the email she had sent indicated that she had), the Supreme Court clarified

[10] [1983] New Zealand Law Reports (NZLR) 22.

that it is necessary to consider the reasonableness of the purported reliance of the party on the other side.

12 Second, the Supreme Court offers an interesting observation on how the law classifies a trial judge's conclusion that it was reasonable for a party to act as it did. Lord Wilson (with whom all the other justices agreed) offered this assessment:

> 'It is not a conclusion of fact. It is a judgement referable to an already established fact and, albeit required by law, it is not a judgement about what the law is. So it is difficult to pigeon-hole it as a conclusion either of fact or of law or even in my view as a conclusion of mixed fact and law. It is, rather, an evaluation …'[11]

Having described matters thus, Lord Wilson took the view that the law was clear that 'an appellate court needed to be satisfied that an evaluative conclusion of a trial judge was wrong before it could be set aside'.[12] Consideration of this requirement is absent from the judgments of the majority in the court below, who had concluded (wrongly, thought the Supreme Court) that the judge had misunderstood the law. Focusing instead on the issue of the judge at first instance's evaluation, the Supreme Court affirms the correctness of that evaluation.

13 The approach in *NRAM* to higher courts' review of lower courts' evaluations is clear: an error on the lower court's part is required. However, as will be seen in the discussion of the next case, a somewhat different view appears to have been taken by the Inner House of the Court of Session, the suggestion being that superior courts are freer to interfere in judicial evaluations than they would be in other sorts of finding.

2. *Anderson v Imrie*, Court of Session (Inner House) 15 March 2018, [2018] CSIH 14, 2018 Session Cases (SC) 328, 2018 Scots Law Times (SLT) 717: Liability of Farm Owner for Injury Sustained by Child while on the Farm

a) Brief Summary of the Facts

14 On 30 June 2003, an eight-year old boy was seriously injured in an accident on a farm. The boy had been left in the care of the second defender, Mrs Imrie, who occupied the farm together with her husband, the first defender. She was caring for the boy, and at the same time looking after her own children as well as tending to a horse. Mrs Imrie left the boy unsupervised for several minutes,

[11] Judgment of Lord Wilson at para 37.
[12] Ibid.

having told him to remain within certain areas of the farm and not to enter other areas, including a concreted area used to control the flow of livestock. Left unsupervised, the boy climbed over a closed gate and entered the concreted area. The boy climbed on to another gate, causing it to fall on and seriously injure him.

15 The boy raised an action of damages against Mr and Mrs Imrie on the ground that the accident was caused by their failure to take reasonable care for his safety. The pursuer argued that the defenders were the occupiers of the farm for the purposes of the Occupiers' Liability (Scotland) Act 1960 ('the 1960 Act'). He claimed that they were in breach of the duties they owed to him under the 1960 Act and also at common law. At first instance, the judge (having held that Mr and Mrs Imrie each qualified as 'occupiers' under the 1960 Act) absolved Mr Imrie of any liability for the boy's injuries, on the basis that he was not in breach of any duty owed to the boy. Mr Imrie had been working elsewhere on the farm at the time of the accident, and there was no evidence to indicate he even knew the boy was on the premises. On the other hand, the judge held Mrs Imrie liable in damages to the boy, although reduced the amount of damages due to him because of a finding of 25% contributory negligence on the boy's part.

16 Mrs Imrie appealed against the decision of the judge at first instance, arguing that: (i) she had not failed in her duty to take reasonable care for the boy; (ii) she was not an occupier of the farm for the purposes of the 1960 Act, because there was insufficient evidence to show that she exercised the required 'control' of the premises; and (iii) so far as the requirements of the 1960 Act were concerned, the judge at first instance had been wrong to conclude that the accident had occurred due to the 'state of the premises' (as required under sec 2(1) of the Act).

b) Judgment of the Court

17 The Inner House of the Court of Session unanimously refused Mrs Imrie's appeal. They did not consider it appropriate to reopen the findings of the judge at first instance in relation to the facts or to the application of the law to those facts. Each of the three judges expressed the reasons for so holding in similar but distinct terms: (1) because the judge at first instance had not been plainly and obviously wrong in relation to the question of whether Mrs Imrie had breached her duty of care (a mixed question of fact and law);[13] (2) because the judge at first instance had been correct on the merits as a matter of substance;[14] and (3) because, in relation to whether the advantages enjoyed by the trial judge in respect of the question at issue placed that judge in such a superior position

[13] See judgment of Lord Brodie at para 36.
[14] See judgment of Lord Drummond Young at paras 52, and 70–79.

that the appellate court ought not to conclude that the judge had reached the wrong decision, it ought not to so conclude in this case.[15]

c) Commentary

18 This decision is of principal interest for the same reason as the judgment just considered in *Steel & another v NRAM Ltd*, that is the judicial exercise of reviewing a lower court's evaluative decision. In this case, that decision related to the application of the rule relating to the standard of care required of an occupier of premises. However, the decision of the Supreme Court in *NRAM* is not referred to by the Inner House of the Court of Session.

19 When can a superior court overturn a finding of a lower court? This question had been considered four years before this decision by the Supreme Court in *Henderson v Foxworth Investments Ltd*[16] (cited by the appeal bench in *Anderson*), when Lord Reed had identified error on the judge's part as the basis of justified intervention by the higher court, citing as examples 'a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence'.[17] Putting it in a slightly different way, Lord Reed had said that in order to reach a conclusion that a judge had been 'plainly wrong' it would be necessary for a higher court to conclude that 'the decision under appeal is one which no reasonable judge could have reached'.[18]

20 The guidance in *Henderson* had thus been to the same effect as that in *NRAM*, that a lower court's judgment must be erroneous before it can be overturned by a higher court. However, in Lord Brodie's view, that guidance was inapplicable to the review of a judge's decision as to how legal rules should be applied to primary facts, what Lord Brodie called

> 'a question of mixed fact and law, or a question of evaluation of or adjudication upon primary facts or, to use the formulation employed by Lord Steyn … "an informed opinion by the judge in the light of all the circumstances of the case." …'[19]

[15] See judgment of Lord Malcolm at paras 95, 96, 111 and 115.
[16] [2014] UKSC 41.
[17] Judgment of Lord Reed at para 67.
[18] Judgment of Lord Reed at para 62.
[19] Judgment of Lord Brodie at para 35.

Such decisions give rise (argued Lord Brodie) to 'greater scope' for higher courts to interfere, though the higher court should still attach importance to the judgment of the trial judge.[20]

21 This approach is hard to reconcile with *NRAM*. *NRAM* was also a case about a judicial evaluation, and a test of a manifest error was applied by the Supreme Court, rather than some test of greater scope. Speaking of 'greater scope' to interfere is rather vague: how is such greater scope to be determined? Lord Reid in *Benmax v Austin Motor Co Ltd*[21] (also cited by Lord Brodie) had argued that:

> '… in cases where there is no question of the credibility or reliability of any witness and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion'.[22]

This suggests a very wide entitlement to interfere, albeit caveated with the vague requirement to 'give weight' to the lower court's view.

22 There is thus some confusion about when higher courts can overturn lower courts: is the approach to be applied to reviewing lower courts' evaluative decisions different from other sorts of decisions? Yes, says Lord Brodie, there is a greater entitlement to interfere than in other sorts of decisions; no, says Lord Wilson in *NRAM*. If it is different, what is the extent of the great entitlement for review? (Lord Brodie's suggestion that it is when 'it is clear that the decision in the court below cannot stand'[23] is surely the conclusion, not the test.) Lord Brodie in fact goes on to express the view that he was not satisfied that the judge at first instance had reached a 'wrong conclusion',[24] and so he appears to have applied the very test of error described by Lord Reed in *Henderson* and Lord Wilson in *NRAM* and not one of any wider scope. The approach of Lord Brodie to the matter at hand does not therefore seem to embody the application of any 'greater scope' for interference.

23 Considering both *NRAM* and *Anderson* together, it is hard to discern from the cases a clear explanation of the proper approach to the question of when higher courts may review an evaluative decision of lower courts. Either the review of such evaluative decisions should be subject to an error standard (as *NRAM* seems to suggest) or there should be greater scope for review (as Lord Brodie in *Anderson* appears to suggest) with the grounds for such greater scope in need

[20] The opinion of Viscount Simmonds in *Benmax v Austin Motor Co Ltd* [1955] Law Reports, Appeal Cases (AC) 370, 374 was relied upon for this point.
[21] [1955] AC 370.
[22] Lord Reid in *Benmax* at 376.
[23] Lord Brodie at para 111.
[24] Lord Brodie at para 115.

of some clear description. Future resolution of the apparent difference in approach between these two decisions would be of great assistance to practitioners and scholars alike.

3. *Kaizer v Scottish Ministers*, Court of Session (Inner House) 29 May 2018, [2018] CSIH 36, 2018 SC 491 2018 SLT 918: Whether Failure of Prison Authorities to Act on a Known Threat of Harm against a Prisoner was a Cause of the Prisoner's Injuries

a) Brief Summary of the Facts

24 The facts of the case are as previously reported in the 2017 Yearbook: the pursuer was an inmate at Aberdeen Prison. He was severely assaulted in the prison gym by a second inmate, who was subsequently convicted for attempted murder in relation to the assault. The second inmate had previously threatened to assault the pursuer. A prison guard, though made aware of this by the pursuer, had failed to take any further action. The pursuer sued the defenders as being liable for the failings of the prison service. He alleged that they had breached a duty to take reasonable care for the safety of those within their prisons, including prisoners. The defenders accepted that such a duty rested on them but denied that they were in breach of it.

25 At first instance, the judge (Lord Ericht) held that, on the facts of the case, the five requirements laid down by Lord Diplock in *Home Office v Dorset Yacht Co Ltd*[25] for establishing the tortious liability of prison authorities (A) for the conduct of a prisoner in their care (C) for harm to another (B) had been met. He therefore held the defenders liable in damages in an amount to be determined at a later hearing. The defenders appealed against this decision, arguing that (i) the judge at first instance had erred in holding that, had the prison officer reported the threat, the attempted murder would have been avoided; (ii) the pursuer had failed to show that it was more likely than not that the attack would not have taken place and had failed to demonstrate that, if a report had been made, the pursuer and his attacker would have been segregated.

b) Judgment of the Court

26 The Inner House of the Court of Session refused the appeal, holding that (1) the failure of the prison officer to report the threat made against the pursuer carried with it an inference that the absence of a report amounted to a failure to take reasonable care for the safety of the pursuer, thereby exposing him to the risk of injury; (2) where negligence is established, and the existence of a risk of

[25] [1970] AC 1004.

injury is demonstrated within the context of a prison setting, a court is entitled to make the reasonable assumption that the prison authorities will do something about the risk which will reduce it to such a level that it will probably not occur; and (3) on that basis, causation could be taken to be established in the absence of some extraordinary factor which might make the incident otherwise inevitable despite the taking of reasonable precautions.

c) Commentary

27 The reasoning of the appeal bench is of interest for the causal inference which the bench felt entitled to make about the counterfactual circumstances which would have prevailed had the warning given to the prison officer been passed on to his superiors. Such an inference was not strictly necessary, given that the appeal bench considered that there had in any event been sufficient evidence presented by witnesses to the judge at first instance to support a conclusion that the attack would have been avoided had the warning been passed on. Nonetheless, the bench felt entitled to make it.

28 The basis for this inference was the court's view that it was entitled to assume that, if a threat had been reported to the prison management, appropriate steps would have been taken to ensure that the threat was neutralised: specifically, that the two prisoners would not have been left without appropriate supervision while in the gym, thereby preventing the attack. That might well be the case, though it is noticeable that no consideration was given as to whether, despite such preventative steps being taken, an attack might have been attempted at some later point, in a different part of the prison. Such an eventuality might have been too fanciful to undermine the causal enquiry into the attack which in fact took place, but it would have been helpful for this to have been the subject of remarks from the bench.

29 The legitimacy of the court making this sort of causal inference is somewhat questionable, given that the requirement of establishing a causal connection between wrongful act and harm rests upon the pursuer. However, in this case the counterfactual hypothesis concerning the specific attack (that no attack would have occurred, had the warning been passed on) was supported by actual witness testimony, so the conclusion reached by the appeal bench seems correct on the facts of the case.

4. *Bowes v Highland Council*, Court of Session (Inner House) 5 June 2018, [2018] CSIH 38, 2018 SC 499, 2018 SLT 757: Whether Conduct of Driver of Vehicle amounted to Contributory Negligence in Respect of Claim against Local Authority for its Negligence in not Adequately Maintaining a Bridge

a) Brief Summary of the Facts

30 On 2 February 2010, at around 10am, Mr Bowes was driving his Toyota pickup truck on a road near the north coast of Scotland. While travelling across a bridge, the vehicle crossed from the westbound to the eastbound lane, collided with the parapet of the bridge and fell into the water. Mr Bowes was unable to escape from his car and he drowned. His partner, parents, children, and sisters sought damages from the defender, the roads authority responsible for maintaining the bridge.

31 At first instance, the pursuers founded on the defender's alleged failure at common law, as the roads authority responsible for managing and maintaining the bridge and its parapets, to take reasonable care for the deceased's safety whilst crossing the bridge. Specifically, it was alleged that the defender, knowing prior to the accident that the bridge and parapet were in a defective condition, ought, in the exercise of reasonable care, to have introduced interim safety measures, or alternatively to have closed the bridge. The judge at first instance held that the death would have been prevented had the defender not breached its duty to deal with the defective parapets by implementing interim measures until the parapets were replaced. He found the defender wholly liable, rejecting its claim that the deceased had been contributorily negligent. The defender appealed against the decision at first instance.

b) Judgment of the Court

32 The Inner House of the Court of Session allowed the appeal in part. They held that (1) the standard of care which the defenders had been required to demonstrate was not that of a professional structural engineer, but rather the ordinary negligence standard of reasonable care in the circumstances. The defenders had already identified the existence of the hazard; their subsequent decision to discontinue monitoring and not to implement interim measures could be judged according to the standard of common sense; (2) the defective parapet caused a significant risk of an accident of a type and severity that would not otherwise have arisen in the case of a careful road user. It was a manifest danger against which the defenders were bound to take preventative measures, but had failed to do so; and (3) while therefore the defenders were in breach of their duty of care, the judge at first instance had made an identifiable error in failing to take

account of the deceased's negligence, which the appeal bench assessed as being at the level of 30% contributory negligence.

c) Commentary

33 The decision at first instance in this case was briefly referred to in the 2017 Yearbook. That first instance decision had been an odd one: the judge, while correctly identifying that the defenders had been in breach of a duty of care owed to the deceased, had failed to take any account of his contributory negligence. The judge had done so having reasoned as follows:

> 'As the deceased did not contribute in any way to the defective parapet and would not have lost his life had the parapet been operating as designed, in fact he would only have sustained minor injuries or none at all, I do not regard the deceased's negligent driving as having contributed in any significant way to causing the harm. I am consequently of the opinion that there is no basis for any finding of contributory negligence on the part of the deceased and I therefore reject the defender's case of contributory negligence.'[26]

34 This was plainly erroneous causal reasoning. As the appeal bench rightly pointed out:

> 'Such an analysis is, however, misleading and incomplete. Of course, on the Lord Ordinary's findings, had the parapet not been defective, the deceased would not have left the road and died. Equally, however, according to the same findings, had the deceased not driven negligently in the first place, thereby impacting the parapet, he would not have left the road and died. The reality, therefore, is that both elements had causative effect in the circumstances of the present case and one cannot be isolated from the other in arriving at a just and equitable outcome.'

35 The appeal bench correctly identified that (to frame the issue in causal terms) each of the driver's negligence *and* the Council's negligence were necessary conditions for the outcome, so that a set of causes minimally sufficient for that outcome was one which included the negligent conduct of each. Having correctly understood this point, the bench could proceed to an assessment of the contribution which the driver's conduct made to the overall harm. Such assessment was said to involve 'both the blameworthiness of the parties and the causal potency of their acts'.[27] In reaching its decision that the reclaimers (ie the Council) were 70% responsible for the harm, the court emphasised that 'the blameworthiness of the reclaimers is demonstrably far greater than that attributable

[26] Lord Mulholland.

[27] Opinion of the court, para 61, referencing the decision of the Supreme Court in *Jackson v Murray* [2015] UKSC 5, 2015 SC (UKSC) 105, 2015 SLT 151.

to the deceased upon the known facts'. Given the importance of the duties resting upon roads authorities, and the reliance placed on the fulfilment of such duties by the general public, this seems a reasonable assessment.

5. *Philp v Highland Council*, Court of Session (Inner House) 7 August 2018, [2018] CSIH 53): Whether Conduct of Harbourmaster amounted to Malicious Actings of Public Official in the Conduct of his Duties

a) Brief Summary of the Facts

36 The pursuer had been approached by a company which had offered him the opportunity of distributing fish feed to fish farms off the coast of Scotland. To enable the proposed arrangement to work, distribution of the feed would require to be undertaken from a suitable harbour. There were two candidate harbours, one of which (at Kyle) was favoured by the company and the pursuer because the pursuer already had a warehouse there. Trials were conducted at Kyle Harbour to test the feasibility of the plan. These trials involved the pursuer using a forklift truck. During the trials, the harbourmaster instructed the pursuer to cease using the forklift truck, claiming that he was not entitled to do so on the public highway without an appropriate licence. The pursuer refused to comply, claiming that the area of ground on which he was carrying out his operations did not form part of the harbour and that therefore the harbourmaster had no authority to issue the instructions he had. The harbourmaster subsequently contacted the company and represented to it that the pursuer did not have an appropriate licence or insurance to undertake the operations, and that he would not allow the planned business operations to take place. This caused the trials to be delayed, allowing the operators of the other harbour to persuade the company to locate its business at its harbour.

37 The pursuer raised an action against the defenders, who were the employer of the harbourmaster. He argued (1) that the obstruction of the trials by the harbourmaster was not made for any good reason: it was outwith the scope of his responsibilities and was 'capricious and arbitrary in nature'. He argued that this conduct had deprived him of the chance of winning the business, and that the defenders were liable in damages for his loss; and (2) that the harbourmaster had subsequently obstructed an attempted sale of his business by the pursuer, and that by making a misrepresentation to a potential buyer this had resulted in the contract negotiations being unsuccessful. He again argued that the defenders were liable for this loss.

38 At first instance, the trail judge found in favour of the defenders, holding that: (1) in relation to the alleged loss of his chance of winning the contract with the company, there was no assumption of responsibility on the defenders' part in

respect of the pursuer's pure economic loss. Further, she held that the defenders were not vicariously liable for the harbourmaster's actions, as those actions were not sufficiently closely connected with his employment to found such vicarious liability; and (2) the pursuer had not pled a relevant case of misrepresentation. The pursuer appealed against these findings.

b) Judgment of the Court

39 On appeal, the Inner House of the Court of Session allowed the appeal, and ordered a proof before answer (a trial of the facts, before a determination of the applicable law). The appeal bench held that: (1) the nature of the pursuer's first claim was that of a claim of the alleged malicious actings of public officials and/or a public authority in the exercise of their duties (this being the Scottish equivalent of what in English law is called misfeasance in public office). The elements of the claim were (i) a deliberate misuse of statutory power, and (ii) malice. The appeal bench thought that the pursuer might be able to prove these elements at a trial of the facts; and (2) the nature of the pursuer's second claim was the same as the first: malicious actings of public officials. Again, the appeal bench thought that the pursuer might be able to prove the necessary conduct at a trial of the facts.

c) Commentary

40 The approach of the judge at first instance in this case was heavily criticised by the appeal bench, who took the view that she had misunderstood the nature of the pursuer's claim. One may have a degree of sympathy with the judge at first instance, however: the pursuer was a party litigant, and the appeal bench note in their judgment that his pleadings suffered from a number of major flaws, including the 'failure to distinguish between vicarious responsibility for the actions of employees … and direct liability for malicious actings on the part of the defenders themselves, through their controlling mind' and confusion 'between liability for a delict, in the form of malicious actions by a public official, and quasi-delictual actings amounting to negligence'.[28] So, the judge at first instance had not had an easy task deciphering the fundamental nature of the pursuer's claims.

41 The appeal bench judgment is of most interest in that it reminds us that the delictual claim of malicious actings of public officials and/or a public authority in the exercise of their duties is the equivalent of the English tort of misfeasance in public office. The genesis of the Scottish claim goes back to the early nineteenth century, and has its own body of native authority to which the courts look for guidance. In giving judgment in cases where the claim has been pled,

[28] See the Opinion of the Court at para 35.

the courts have spoken of public officials acting 'maliciously and without probable cause'[29] and from 'injurious and oppressive motives'.[30] In the case at instance, the pursuer was alleging that the harbourmaster's actings had been motivated by an ulterior motive to see the alternative harbour benefited (illegally) by the business opportunity. If proven, this would seem to fit the requirement of improper motive set out in the relevant case law.

42 A further point of more general note is a warning from the appeal bench about how judges ought to behave in the presence of party litigants. In his appeal, the pursuer had alleged that the judge at first instance had demonstrated 'subconscious bias'. The appeal bench did not believe there to be any substance to this allegation, but nonetheless felt moved to comment that:

> 'the pursuer's criticisms do highlight the need for courts to be circumspect, especially in cases involving party litigants, when complimenting legal practitioners, their assistance to the court or diligence in preparation. Praise from the Bench, when merited, can be a deserved morale boost to the practitioner concerned. There is a place for it within the wider legal system. Whether, and to what degree, it should find its way into a judicial opinion is a more delicate question.
>
> Because of the potential effect it may have on the perception of the, often unsuccessful, opposition, especially when that party's forensic efforts have been met with opprobrium, it should certainly not feature as a matter of routine. It may be best to confine it to rare and exceptional cases'.[31]

This exhortation to judges to avoid overly praising legal practitioners in the presence of an opposing party litigant shows commendable concern for ensuring that justice is not just done but is seen to be done.

6. *Malone v Lord Advocate*, Court of Session (Outer House) 17 August 2018, [2018] CSOH 86, 2018 SLT 1129): Whether Lord Advocate was Vicariously Liable for Failure to Protect Employee of the Prosecution Service from Psychiatric Harm Suffered at Work

a) Brief Summary of the Facts

43 The pursuer was a former senior prosecutor with the Crown Office and Procurator Fiscal Service (COPFS). She raised an action of damages (claiming

[29] *Ballantyne v Glasgow Licensing Board* 1986 SC 266.
[30] *Dawson v Allardyce* 18 February 1809, 15 Faculty Collection of Decisions (FC) 202 at 203–4.
[31] See the Opinion of the court at para 42.

£ 1,300,000) against the Lord Advocate for psychiatric injury which she alleged was caused by her working conditions, specifically an unduly heavy burden of work. Her action alleged fault and negligence against the COPFS, for whom the Lord Advocate was said in her pleadings to be 'vicariously responsible'.

b) Judgment of the Court

44 The Lord Ordinary (judge at first instance) ordered a proof before answer (a trial of the facts, before a determination of the applicable law). He held that: (1) the case as pled certainly did not read like a case of vicarious liability. Confusion may have arisen because of a conflation of two separate sorts of circumstance: (i) delicts committed by servants or agents of the Crown, and (ii) breach of those duties which a person owes to his servants or agents at common law by reason of being their employer. As the pursuer was relying on a systemic failure on the part of the COPFS to address work overload, giving rise to breach of the employer's primary duty of care, it was doubtful that the issue of vicarious liability arose at all; (2) looking at the totality of the pursuer's pleadings, enough had been averred to allow a proof before answer: if proved, the pursuer's averments were capable of demonstrating that she had been required to perform duties in excess of those which she would have been entitled to expect, and that failure to address that situation created a foreseeable risk that the pursuer would suffer the kind of harm of which she complained.

c) Commentary

45 Claims by employees of being overworked are on the rise, especially in the public health service and the financial services sector. Many such claims are resolved without going to court, so this reported decision is worth noting. Somewhat badly drafted pleadings might have thwarted the pursuer's claim in this case, but the judge was willing to overlook infelicities in drafting and allow the case to proceed to a trial of the facts.

46 The poor drafting related to confusion as to the precise nature of the pursuer's complaint: was she complaining about personally culpable conduct on the part of the Lord Advocate, for instance a failure on his part to address a specific workplace problem to which his attention had been drawn? Or was the complaint alleging vicarious liability on his part (as a Crown Officer) for the delict of another crown servant? Or was the claim raised against the Lord Advocate as the pursuer's employer, who would as such be potentially liable no matter who precisely within the COPFS had contributed to its alleged failings? The judge, having heard oral argument as to the nature of the pursuer's complaint, formed the view that the substance of the claim was most likely of the third sort (hence not one complaining of any personal wrongdoing by the Lord Advocate or of vicarious liability on his part).

47 Given the lack of clarity in the written pleadings, the pursuer in this case was fortunate to be allowed a proof before answer. The decision should act as an incentive to those drafting pleadings concerning workplace delicts to think carefully about the nature of the alleged harm and thus of whom to sue and for what.

7. *Whitehouse v Gormley*, Court of Session (Outer House) 6 September 2018, [2018] CSOH 93: Whether Detention of the Administrator of a Football Club by the Police Amounted to a Delict

a) Brief Summary of the Facts

48 This action arose out of a 2012 criminal investigation into the acquisition of Glasgow Rangers Football Club in May 2011 and the subsequent financial management of the Club. The investigation followed a preliminary police examination of information passed to them in 2012 by the Club administrators. The pursuer, Mr Whitehouse, had been an administrator of Rangers Football Club until demitting office in October 2012. He was one of the individuals who were the subject of the police enquiries.

49 At dawn on Friday 14 November 2014, the pursuer was detained at his home by officers from Police Scotland. He was informed that the basis for his detention was a 'fraudulent scheme and attempt to pervert the course of justice'. He was taken to a police station in Glasgow where he was interviewed, arrested and charged. He was held in police custody until Monday 17 November 2014, when he appeared in Glasgow Sheriff Court. Requests for him to be released or liberated on an undertaking were declined, the police citing direction to that effect by the Crown. He was again arrested and held overnight in September 2015, appearing at Glasgow Sheriff Court when he was committed for further examination and admitted to bail. Other suspects in the investigation were permitted to attend the police station by arrangement. In June 2016, the Crown announced that no further action would be taken against the pursuer.

50 The pursuer raised an action against (i) the Chief Constable of Police Scotland, (ii) the Procurator Fiscal For Specialist Casework in the Crown Office, and (iii) the Lord Advocate, seeking payment by them, jointly and severally or severally, of £ 9 million by way of damages for alleged wrongful detention, arrest and prosecution based on common law fault and breaches of arts 5 and 8 of the European Convention on Human Rights (ECHR). (The claims relating to the ECHR are not considered below.) The Lord Advocate claimed a Crown immunity from suit. It was the contention of the Chief Constable that, to succeed, any claim in respect of the conduct of the arresting police officers would require

to prove malice or an improper motive on their part; the pursuer however contended that all that he required to show was that the police had acted outwith their competence.

b) Judgment of the Court

51 The judge (Lord Malcolm) held that: (1) the Lord Advocate enjoyed a common law immunity against civil suits, hence the common law claims against him were dismissed. This immunity had been settled in the case of *Hester v MacDonald*.[32] The position adopted in that decision regarding immunity from civil suit at common law remained good law, and was unaffected by the introduction of a separate remedial regime under the ECHR; (2) a proof before answer (a trial of the facts, before a determination of the law) would be allowed in relation to the claim against the Chief Constable. In relation to that claim, the pursuer would require to demonstrate malice and a want of probable cause on the part of the arresting police officers in order for his claim to succeed.

c) Commentary

52 This judgment concerns the common law wrong constituted by an unlawful deprivation of an individual's liberty. The further aspects of the judgment - the common law immunity of the Lord Advocate from civil suit in general, and the ECHR dimensions of the case - though of far-reaching importance, are not analysed below.

53 The discussion of the law relating to the wrong of unlawful deprivation of liberty occurs within the portion of the lengthy judgment concerning the claim by the pursuer against the police. Lord Malcolm prefaced his discussion of the relevant law with a helpful preamble explaining why, in relation to that delict, public officials (including police officers) benefit from an immunity against suit. His opening remarks merit quoting here:

> 'Our law aims to provide appropriate protection to public officials who, when exercising their public duties, do something which, in terms of the constraints on their powers, they are not entitled to do. In particular they will not be liable in civil damages unless they acted without probable cause and were actuated by malice or some other improper motive. If matters are explained by an honest mistake, overzealousness, or the like, the necessary bad faith or deliberate abuse of power is absent. The policy is that public officials should be able to act in the public interest free of a concern that if they err, or overstep the mark, they will be subject to a civil suit from anyone harmed by their conduct. Claimants have attempted to exclude the protection, or privilege as it is sometimes called, by a submission that the official acted outwith or beyond his powers, and thus is in the same position as a private wrongdoer.'

[32] 1961 SC 370.

54 The existing case law concerning the immunity of police officers is difficult to reconcile and explain, especially in relation to whether malice is a necessary element of any claim. The cases for the most part consider malice to be a necessary element of any claim, though they have differed on whether malice may need not be pled but may be inferred from the wrongful act, or whether it is necessary to aver facts and circumstances from which malice might be inferred.[33] Further uncertainty was created in the case of *McKinney v Chief Constable, Strathclyde Police*,[34] in which the judge preferred the view that, if an arrest is alleged to be 'unlawful' (which might be the case if the officer had simply made a mistake about the power to arrest), it must be justified by the officer as having been made for probable cause (malice is, on this approach, *not* a required element of a claim). By contrast, a more traditional view was taken in *Woodward v Chief Constable, Fife Constabulary*,[35] in which it was said that the mere fact that an officer acted wrongfully to interfere with the liberty of an individual does not deprive the officer of immunity against civil suit (on this view, malice *is* a required element of a claim).

55 Lord Malcolm engages in an extensive debate of the relative merits of the two positions, preferring that adopted in *Woodward*.[36] He summarises matters this:

> 'the police should be able to discharge the duties of their office without being exposed to civil damages claims unless want of probable cause and malice are proved. Anything less, such as error, incompetence, or overzealousness, is not enough to set aside the privilege. And this remains so even if the error renders the conduct unlawful. It may be that sometimes judges have conflated malice and a lack of probable cause with conduct beyond the competence of the officer … but logically something more or different is required if the conduct is to be removed from the plea of privilege, perhaps conduct of a type which the law could never recognise as part of the officer's authorised duties, even if the officer honestly thought otherwise. If one is not in that territory, the law does not impose civil liability upon a public officer who is carelessly but honestly pursuing his public duties.'

56 There is an interesting contrast here with English law. In England, the tort of false imprisonment is a tort of strict liability. Once an absence of lawful authority to imprison someone is proven, it does not matter whether the imprisonment

[33] Lord Malcolm's judgment at para 139.
[34] 1998 Scots Law Times, Sheriff Court Reports (SLT (Sh Ct)) 80.
[35] 1998 SLT 1342.
[36] See para 152.

was imposed in an honest but mistaken belief that it had a lawful basis.[37] Notably, malice is not required.[38] This might be said to suggest that English law places a higher value on the right to liberty than does Scot law. But, to look at it from the other side, it can also be said that Scots law has a higher regard for the protection of police officers who act honestly and in good faith in the discharge of their duties.

57 The judgment in this case is only at first instance, and this is unlikely to represent the final word of the Scottish courts on the issues raised. Nonetheless, given the detailed and close analysis of Lord Malcolm in his judgment, his views are likely to be treated with a great deal of respect.

8. Personal Injury

58 The majority of reported personal injury cases were, as in previous years, cases of road traffic accidents. In addition to the other sorts of case discussed below (or above), reported cases included that of a pedestrian tripping over a large stone on National Trust property,[39] a nurse attacked by an autistic patient, [40] a beauty salon customer who had an allergic reaction to a treatment,[41] and an employee falling on an uneven floor.[42] Additionally, following the groundbreaking decision reported last year of *C v G*,[43] in which a civil damages award was made in respect of a rape, a further such claim was successfully brought in 2018 (damages of £ 80,000 were awarded).[44]

59 A couple of actions instituted by elected (or former) politicians in respect of defamation were reported in 2018. In *McAnulty v McCulloch*,[45] a local councillor representing the Scottish National Party sued a fellow activist in relation to a statement made in an email sent by the activist which alleged that the councillor had made racist statements to the activist. The claim was successful, and the councillor was awarded damages of £ 40,000 for the damage to her reputation. Meanwhile, the ongoing saga related to a defamation action by former member of the Scottish Parliament, Tommy Sheridan, continued to occupy the

[37] On the requirements of the tort of false imprisonment in English law, see *R ex parte Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

[38] *Weldon v Home Office* [1990] 3 Weekly Law Reports (WLR) 465: 'The intention necessary for commission of the tort is intentionally to do the act which causes the imprisonment. Added malice towards the imprisoned plaintiff is not necessary …' (per Ralph Gibson LJ, at 470).

[39] *McKevitt v National Trust for Scotland* [2018] Reparation Law Reports (Rep LR) 76.

[40] *Stark v Lothian NHS Board* [2018] Sheriff Court Edinburgh (SC EDIN) 7.

[41] *Grubb v Shannon* 2018 SLT (Sh Ct) 193.

[42] *Sloan v Lindvale Plastics* [2018] SC EDIN 17.

[43] [2017] CSOH 5, 2017 SLT 79, discussed in *E Karner/BC Steininger* (eds), European Tort Law 2017 (2018) 527, nos 6–12.

[44] *AR v Coxen* 2018 SLT (Sh Ct) 335.

[45] [2018] CSOH 121.

courts, with a decision given by the Inner House of the Court of Session in *Sheridan v News Group Newspapers Ltd*[46] that the pursuer was entitled to interest on a sum of £ 200,000 awarded against the defenders from the date of the court's decree until the date when the sum had been paid. The appeal court took the view that the judge at first instance had wrongly refused the award of interest.

60 Shopping centres can be dangerous places. In *Beaton v Ocean Terminal Ltd*,[47] the pursuer slipped at the defenders' shopping centre, fracturing her ankle. The pursuer claimed damages of £ 16,000 but was unsuccessful in that claim. She had slipped on a sign warning that the floor was wet. The bright yellow plastic sign, though designed in normal conditions to be placed upright, had been folded in half and placed flat on the floor. The pursuer failed to notice it, stepped on it and slipped. Her claim failed because the judge held that, in placing the bright yellow sign on the floor, the defenders had exercised reasonable care; in other words, they had not breached the duty of care incumbent upon them.

61 As every year, a number of cases of liability for asbestos-related injuries came before the courts. One such was *Thacker v North British Steel Group*,[48] in which damages were awarded to the widow and family of an employee of the defenders who had died from mesothelioma contracted at work. The total quantum of damages had been agreed by the parties at £ 360,000. This figure is comparable to that of approximately £ 340,000 awarded in a 2017 case.[49]

62 As also every year, the courts dealt with claims relating to childhood abuse. In *A and B v C*,[50] two women (who were cousins) claimed damages in respect of the sexual abuse they had suffered as children at the hands of a man who was the step-father of the first woman. The court awarded the step-daughter damages totalling £ 167,000, and the second woman £ 33,000 (the overall duration and frequency of abuse in the second case had been less). In the case of the first woman, £ 90,000 was awarded as *solatium* (for the pain and suffering she had experienced and would experience in the future); £ 10,000 for loss of earnings, both past and future (she had been unable to work at various times because of the trauma she experienced, requiring treatment for this); and £ 5,000 for medical expenses for cognitive behavioural therapy.

46 [2018] CSIH 76.
47 [2018] CSOH 74, 2018 Rep LR 110.
48 [2018] CSOH 73, 2018 SLT 799.
49 *Manson v Henry Robb Ltd* [2017] CSOH 126.
50 [2018] CSOH 65.

C. Literature

1. *Gordon Cameron*, Delict (5th edn 2018), LawBasics series

63 This is the fifth edition of a popular student primer on the law of delict. The book is popular with students when preparing for examinations in introductory courses to delict, as it seeks to cover the entire subject in a readable and accessible manner.

2. *James Bailey*, Aggravated Damages or Additional Awards of Solatium, Edinburgh Law Review 22(1), 2018, 29–54

64 In this article the author undertakes an examination of whether the category of 'aggravated damages' utilised in English law has an equivalent in Scots law (in one recent Scottish case, *Adebayo Aina v Secretary of State for the Home Department*[51] it was suggested by the judge that there was no barrier to their recognition in Scotland). The author explores the idea that the existing category of *solatium* (compensation for pain and suffering) might be capable of performing the same function as aggravated damages, as it is an award designed to reflect, in each case, the degree of suffering experienced by a pursuer. The author cites a number of defamation cases in which it is argued that aggravating factors have been reflected in increased awards of *solatium*. The author prefers this approach to the separate category of aggravated damages used by English law, arguing that '[i]t prevents such awards being mistaken for punitive damages, it avoids the need for the courts to make artificial and arbitrary distinctions when granting awards and it helps to promote a coherent, unified approach to the availability of damages for mental distress'.[52] The author makes out a compelling case as to why Scots law should not adopt the approach of English law in this area.

3. *Bobby Lindsay*, Fostering in a New Age of Vicarious Liability? Edinburgh Law Review 22(2) 2018, 294–301

65 The author examines the United Kingdom Supreme Court's decision in *Armes v Nottinghamshire Council*[53] (concerning the vicarious tortious liability of a local authority for child abuse committed by foster parents) and considers whether the approach taken would be likely to be followed by the Scottish courts. The author's view is that, given the processes attendant upon the fostering of children in Scotland (where 'carers are not independent care-providers

[51] [2016] CSOH 143.
[52] At 54.
[53] [2017] UKSC 60, [2017] 3 WLR 1000.

for individual placements, but an integrated part of the local authority's care-provision service'[54]), the same rationale for the imposition of vicarious liability would be applicable.

4. *Lesley-Anne Barnes Macfarlane*, Rethinking childhood contributory negligence: 'blame', 'fault' – but what about children's rights? Juridical Review 2018, 75–97

66 The author examines the law of contributory negligence in Scotland as it relates to children. She argues that, while in many areas of domestic law, the child's best interests are discernible as a consideration when decisions are made that have an impact on children, those interests are not recognised as being of primary, or indeed of any, consequence in determinations about childhood contributory negligence. She further argues that judgments about the contributory negligence of the young often indicate inconsistent, and unpredictable, approaches and outcomes concerning children.

67 The author considers a number of options for reform of the law, practice and policy (including a Children's Civil Injuries Compensation Scheme) that she argues would render the way the legal systems in the UK address the contributory negligence of children more compliant with art 3 of the United Nations Convention on the Rights of the Child. The author's argument is an interesting one, although other perspectives are also possible. For instance, an alternative view might be that contributory negligence findings can assist in developing in children a sense of responsibility for the consequences of their actions and that this could be said to be in their 'best interests'. Additionally, it might be questioned why, simply because a claimant is a child, a child-centred 'best interests' enquiry should trump the wider interest of the law of delict in achieving an even-handed assessment of responsibility for harm.

5. *Eleanor J Russell*, The liability of roads authorities revisited, Juridical Review 2018, 283–291

68 The author examines the state of the law in relation to the liability of roads authorities for dangerous roads in the light of three recent cases (including *Bowes v Highland Council*, discussed above[55]). She contrasts the Scottish approach to this issue (which imposes common law liability on roads authorities) with the English approach (which does not). She argues that the recent case law draws attention to the importance of two matters for injured parties: (1) the need for pleadings from which the existence of a hazard can be inferred; and (2) the

[54] At 300.
[55] At no 30 above (CSIH, 5 June 2018, [2018] CSIH 38, 2018 SC 499, 2018 SLT 757).

need for a secure foundation in the evidence of what a reasonable roads authority would have done in the same circumstances.